Ross v. Bank of America[1]

I. INTRODUCTION

With a very narrow opinion in *Ross v. Bank of America*, the Second Circuit has opened a new door in the ongoing narrative surrounding mandatory arbitration and class action waivers in consumer agreements.[2] While the Second Circuit's decision merely determined that the plaintiffs had stated a sufficient harm to gain standing and then remanded the case for decision on further standing issues, it did so only after making a subtle, but important, distinction between harms caused by *enforcing* waiver agreements and harms caused by the *existence* of widespread waiver agreements.[3]

Until recently, the focus of the class action waiver debate has been whether such waivers, when combined with mandatory arbitration clauses, are either unconscionable or illegal in consumer contracts.[4] Although upholding class action waivers arguably shields businesses from frivolous litigation, the *enforcement* of the waivers effectively bars individuals from recourse in consumer disputes because the cost of arbitration would most likely outweigh any potential damages.[5] The *Ross* holding establishes that damages may be recoverable, in an antitrust context, to consumers regardless of whether waivers are ever enforced.[6]

II. LEGAL BACKGROUND

Including a class action waiver in a mandatory arbitration clause has become standard practice for many service contracts, including credit card agreements.[7] With the majority of federal and state courts permitting and even encouraging mandatory arbitration clauses, the validity of including

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[1] Ross v. Bank of America, 524 F.3d 217 (2d Cir. 2008).

[2] *See* Jean Sternlight, *Ross v. Bank of America: Important Victory for Consumers Subject to Arbitration Provisions*, http://www.indisputably.org/?paged=6 (last visited May 13, 2009). (The full article is only available on cached pages. A copy of the full article is on-file with the author).

[3] *See generally Ross*, 524 F.3d. at 217.

[4] *See* Byron Rice, *Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for a Judicial Standard*, 45 HOUS. L. REV. 215, 226–58 (2008).

[5] *Id.* at 247–48.

[6] *Ross*, 524 F.3d at 223–25.

[7] Rice, *supra* note 4, at 224.

class action waivers has become an important issue in consumer litigation.[8] Federal Circuits are unevenly split on whether to uphold the combination of class action waivers and mandatory arbitration clauses.[9] Specifically, the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have found that compulsory class action waivers are legal; the First and Ninth Circuits have found them to be illegal or unenforceable.[10]

Significant class action waiver decisions have been structured on several different legal premises, including economic or judicial efficiency, freedom to contract, unconscionability, and substantive right restriction.[11] Circuits which have upheld waivers have substantially relied on the Supreme Courts' acknowledgement that a plaintiff's substantive due process rights do not include a right to participate in a class action where other remedies are available, such as arbitration on an individual basis.[12] These courts have also upheld waiver clauses on principles of contract law.[13] Specifically, under a freedom to contract theory, where consumers are not "forced" into signing a waiver, companies should be permitted to contractually protect themselves from frivolous litigation which is much less frequent when individually pursued.[14]

Courts which have determined that class action waivers, coupled with mandatory arbitration clauses, are not enforceable have based their holdings on arguments of unconscionability and restriction of substantive rights.[15] The Ninth Circuit determined that class action waivers may be unconscionable where they result in customers bearing greater costs "than those a complainant would bear if he or she would file the same complaint in court."[16] Additionally, the First Circuit declared that the substantive implications of forbidding a procedural mechanism, such as a class action, may be such that enforcing them abrogates consumers' substantive

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[8] *Id.* at 224–25.

[9] *Id.* at 226.

[10] *Id.*

[11] *Id.* at 246–52.

[12] *See* Randall Quarles, *Courts Disagree: Is Arbitration A "Class" Act?*, 68 ALA. LAW. 476, 476–77 (2007).

[13] *See* Rice, *supra* note 4, at 248–50.

[14] *Id.*

[15] *Id.* at 251–52.

[16] Ting v. AT&T, 319 F.3d 1126, 1151 (9th Cir. 2003).

rights.[17] The *Ross* decision is significant because it relies on none of the above legal premises, but instead details a different legal premise.[18]

III. FACTS AND PROCEDURAL HISTORY

In 2005, cardholders of various banks[19] filed a class action lawsuit in the Southern District of New York alleging that the banks violated antitrust laws by collectively forcing cardholders to accept mandatory arbitration clauses containing class action waivers as part of their cardholder agreements.[20] The cardholders made two antitrust claims against the banks.[21] First, the cardholders alleged an illegal conspiracy to "impose mandatory arbitration clauses" in violation of the Sherman Act.[22] Second, the cardholders alleged an illegal group boycott by the banks of customers who refused to agree to the arbitration clauses.[23] Specifically, the cardholders' claim alleged that the collusion of the banks to impose mandatory arbitration along with class action waivers has resulted in three harms: (1) banks have been able to "immunize themselves from economic responsibility for antitrust and

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[17] *See* Quarles, *supra* note 12, at 477.

[18] *See generally* Ross v. Bank of America, 524 F.3d 217 (2d Cir. 2008).

[19] *Id.* at 219–20. Defendant banks include: Bank of America, N.A. (USA); Capital One Bank; Capital One F.S.B.; J.P. Morgan Chase & Co.; Chase Bank USA, N.A.; Citigroup, Inc.; Citibank (South Dakota), N.A.; Citibank USA, N.A.; Citicorp Diners Club Inc.; Universal Bank, N.A.; Universal Financial Corp.; Novus Credit Services, Inc.; Discover Financial Services, Inc.; Discover Bank; HSBC Finance Corporation; HSBC Bank Nevada, N.A.; MBNA America Bank, N.A.; MBNA American Bank (Delaware), N.A.; Providian Financial Corporation, Providian National Bank, Inc. (American Express Travel Related Services Company is part of the litigation only as an interested party). *Id.* at 217–19. As a side note:

> Defendants-Appellees Discover Financial Services, LLC, Novus Credit Services Inc., and Discover Bank ("the Discover Appellees") proceed separately; they contend that their cardholder agreements do *not* contain mandatory arbitration clauses and class action prohibitions. Rather, Discover and Novus cardholders are given a window during which they can opt out of mandatory arbitration. However, the Discover Appellees join the other banks in arguing that the cardholders lack Article III standing, the principal issue in this appeal. For the purpose of the standing question, then, we consider Defendants-Appellees collectively.

Id. at 220.

[20] *Id.*

[21] *Id.* at 221.

[22] *Ross*, 524 F.3d at 221.

[23] *Id.*

consumer protection violations"; (2) the cost and risk of antitrust non-compliance has been shifted to cardholders by substantially increasing any dispute resolution costs to individual cardholders; and (3) the absence of non-arbitration credit cards in the market has diminished the overall quality and value of credit card services offered to consumers.[24] The cardholders sought an injunction to prevent the banks from future collusion in regard to arbitration clauses, invalidation of all existing arbitration agreements, and dismissal of all currently pending bank-sponsored litigation against cardholders.[25]

A year later, the district court dismissed the complaint stating that the cardholders' injuries were "entirely speculative and, therefore, insufficient to establish Article III standing" under the Constitution to seek judicial recourse.[26] The district court found the injuries to be "entirely speculative" because the cardholders' alleged harms were all contingent upon occurrence of future misconduct by the banks.[27] The court reasoned that because no misconduct requiring arbitration had occurred, the arbitration clause had not been invoked or enforced, and thus, the cardholders' alleged harms had also not yet occurred.[28] The cardholders appealed to the Second Circuit Court of Appeals contesting that mandatory arbitration clauses in credit card contracts, when a product of illegal collusion, do constitute Article III "injury in fact" and thus standing should be granted.[29]

IV. HOLDING AND REASONING

A. *Threshold Requirement: Injury in Fact*

Article III of the United States Constitution only extends power to the judiciary to decide "actual cases and controversies" and does not extend power to decide hypothetical questions of law.[30] Thus, in order to have standing to bring a claim authorized by the Constitution, a plaintiff must have an "injury in fact" that is related to the challenged action and redressable by a

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[24] *Id.*

[25] *Id.*

[26] *Id.* Additionally, a plaintiff must have antitrust standing. Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc., 467 F.3d 283, 290–92 (2d Cir. 2006). However, a court only analyzes antitrust standing after Article III standing has been established. *See, e.g.*, Kochert v. Greater Lafayette Health Servs., Inc., 463 F.3d 710, 714–16 (7th Cir. 2006).

[27] *Ross*, 524 F.3d at 221.

[28] *Id.* at 222.

[29] *Id.*

[30] *Id.* at 223.

judicial decision.[31] This threshold for standing, however, is not a high one—"injury in fact" may consist of a nominal harm or even a plaintiff's fear of future harm.[32]

B. *Legal Analysis: Reduced Choice and Services are Injury in Fact*

The circuit court espoused that the cardholders' claims represented a subtle variation from the typical, more common class action arbitration clause arguments because the cardholders were not challenging the validity of the arbitration and class action provisions in their credit agreements. Rather, the cardholders were bringing an antitrust violation claim against *the means* used by the banks in establishing mass arbitration agreements.[33] The circuit court pointed out that, contrary to the finding of the district court, the dormancy or enforcement of the arbitration clauses was not relevant to the analysis of the cardholders' alleged damages.[34] The circuit court then explained that the cardholders' alleged harms are injuries to the market and not injuries to any individual cardholder from the possible invocation of an arbitration clause.[35]

According to the circuit court, antitrust injury need only consist of restriction to consumers from making "free choices between market alternatives."[36] The cardholders' claim asserts that as a result of illegal collusion and group boycott, consumers have been "deprived of any meaningful choice on a critical term and condition of their general purpose card accounts" and that this reduces consumer choice and diminishes the quality of credit services available to consumers in general.[37]

Additionally, the circuit court addressed two specific arguments of the banks: (1) reduced consumer choice merely represents harm to a "subjective

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[31] *Id.*

[32] *Id.* at 223. Article III standing is not the same as antitrust standing. An injury which results in antitrust standing requires (1) that violation of antitrust laws caused or threatened to cause the plaintiff injury in fact; (2) that the injury is not too remote or duplicative; (3) that the injury is the kind of injury that antitrust laws were intended to prevent; and (4) that the damages claimed or awarded are reasonable and quantifiable. Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 66 (2d Cir. 1988).

[33] *Ross*, 524 F.3d at 223.

[34] *Id.* The district court stated that because the banks did not invoke the arbitration clauses in the present dispute, "they are dormant contract provisions incapable of creating the requisite Article III injury-in-fact." *Id.*

[35] *Id.* at 224.

[36] *Id.*

[37] *Id.*

preference"; and (2) antitrust laws only protect consumer choice where there is an ascertainable economic impact on the market.[38] The circuit court stated that the cardholders' claim presents two objective harms to consumer choice.[39] First, the bank collusion to mandate arbitration clauses containing class action waivers effectively excludes consumers from any class action lawsuits. Thus cardholders are forced to "expend time and legal fees to monitor the legality of the banks' behavior, whereas if the cardholders had access to a card that permitted class actions, they would have the option of relying on motivated class action attorneys to perform this function."[40] A card with a mandatory arbitration clause and class action waiver is therefore, less valuable than a card without such provisions.[41] Second, the court explained that the present value of cards containing both mandatory arbitration and class action waivers is also diminished because a "card that limits the holder to arbitration is less valuable (all other factors being equal) than a card that offers the holder a choice between court action or arbitration."[42]

The circuit court further stated that the banks' argument that the cardholders do not have an actionable harm under antitrust law is misplaced because Article III standing is distinct from antitrust standing.[43] Antitrust standing requires a "detailed and focused inquiry into a plaintiff's antitrust claims," whereas Article III standing merely requires that plaintiffs allege a harm or fear of future harm connected to defendants' challenged conduct and that these harms can be redressed through judicial action.[44] Accordingly, the circuit court found that plaintiffs' harm met the standard of harm for Article

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[38] *Ross*, 524 F.3d at 224.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 224.

[42] *Id.* The court explained that:

> The cost of litigating the antitrust issue when the particular dispute arises will almost certainly be disproportionate to the dispute. (A plaintiff will not spend a hundred thousand dollars in legal fees to litigate a five thousand dollar dispute.). Furthermore, the cardholders' ability to prove the illegal collusion may well have evaporated with the passage of time, due to the deaths, retirements, changes of jobs, and fading memories of the participants and observers of the conspiratorial meetings, as well as the loss and destruction of documents.

Id.

[43] *Ross*, 524 F.3d at 224–25.

[44] *Id.* at 225.

III standing and thus plaintiffs presented an actionable harm.[45] The court did not address whether plaintiffs would in fact meet requirements for antitrust standing,[46] or the other two prongs of Article III standing (causation and redressability) because they were not addressed in the district court's opinion.[47]

Additionally, the court addressed one further issue regarding the doctrine of prudential ripeness.[48] The defendant banks contended that the cardholders' claim was not ripe for adjudication "because the cardholders are not faced with a sufficiently imminent threat of injury, and, as a prudential matter, their antitrust claims would better be entertained at a later time."[49] The court stated that the purpose of requiring a dispute to be ripe before adjudication is to prevent courts from becoming "entangled" in speculative or hypothetical disputes.[50] Thus, for the same reasons that the cardholders' claims were sufficiently imminent to constitute Article III injury in fact, they avoid the pitfalls associated with "unripe" disagreements.[51] Therefore, the court deemed the cardholders' claims ripe for adjudication.[52]

V. POTENTIAL IMPACT

The *Ross v. Bank of America* decision is potentially very important to consumers pursuing class actions.[53] Because the plaintiffs in *Ross* sought

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[45] *Id.*

[46] *Id.* at 225.

[47] *Id.* The court specifically addressed Discover's contention that its credit agreements do not mandate arbitration and impose a class action waiver by stating:

> The Discover Appellees urge us to affirm the district court's judgment as to the cardholders' claims against them, arguing that because their cardholder agreements allow individuals to opt out of mandatory arbitration, they do not cause any antitrust injuries. Because the district court disposed of all of the cardholders' claims on standing grounds, it did not examine the specific ramifications of the Discover Appellees' cardholder agreements. We remand Plaintiffs-Appellants' claims against the Discover Appellees to afford the district court the opportunity, in the first instance, to examine the opt-out provisions and to determine whether the Discover Appellees should be treated differently from the other banks.

Id.

[48] *Ross*, 524 F.3d at 225–26.

[49] *Id.*

[50] *Id.* at 226.

[51] *Id.*

[52] *Id.*

[53] *See id.*

relief under antitrust and RICO statutes, on remand the court must examine the nature of the plaintiffs' alleged harms as to how they affect the overall market and not from the viewpoint of unconscionability or denial of substantive rights.[54] The *Ross* decision provides courts with a new foundation upon which to structure class action waiver analysis and one that proves to be favorable to consumers if they are able to bring a legitimate antitrust claim.[55]

The decision potentially also has far-reaching implications in terms of the scope of damages available to plaintiffs.[56] As Professor Sternlight comments:

> Where, as plaintiffs allege in *Ross*, essentially an entire industry (such as the credit card industry) has chosen to impose individual binding arbitration on its customers, the *Ross* decision offers the possibility that companies who allegedly conspired to limit consumers' dispute resolution choices can be held culpable civilly or criminally for violating antitrust laws. As antitrust law makes available not only injunctive relief but also treble damages, and attorney fees, it may be a powerful tool for reining in industries intent on limiting consumers' procedural options. Potentially such antitrust suits can be brought in other industries, such as securities, nursing home, cell phones, or auto dealerships, where the allegation has been made that it is difficult or impossible for consumers to secure a particular good or service without giving up the opportunity to resolve future disputes in court and through class actions, rather than through individual arbitrations.[57]

Accordingly, the *Ross* decision may not only open up the door for more future court decisions striking down class action waivers, but it also opens the door to diverse remedies for plaintiffs.[58]

Erin Holmes

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[54] *See* Sternlight, *supra* note 2.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*